82744-3

NO. 36804-8

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

MATTHEW HIRSCHFELDER,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

WASHINGTON EDUCATION ASSOCIATION'S AMICUS CURIAE BRIEF

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I. STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Opening Brief of defendant/ petitioner Matthew J. Hirschfelder.

II. SUMMARY OF ARGUMENT

Mr. Hirschfelder is charged with having committed Sexual Misconduct with a Minor in the First Degree in violation of RCW 9A.44.093(1)(b). It is undisputed that the alleged victim was over eighteen years of age when the alleged misconduct occurred.

This Amicus argues that RCW 9A.44.093(1)(b) is an ambiguous statute and it would be a violation of the rules of statutory construction and the rule of lenity to enforce this statute against this defendant based on the facts in this case. The statute not only is entitled Sexual Misconduct with a Minor but the text of the statute contains the same language. Consequently, this Amicus argues that the statute should be interpreted to only apply in situations where the victim is less than eighteen years old and not be applicable when the victim is eighteen years old and no longer a minor.

III. ADDITIONAL RELEVANT FACTS

RCW 9A.44.093(1)(b) originated in HB 1091 which was passed by the Legislature in April 2001 and vetoed by Governor Gary Locke in May 2001. CP 34. After adding language that requires that the school

employee be sixty months older than the victim, the Legislature passed and Governor Locke signed a large omnibus bill, 3ESSB 6151, which included that has been codified as RCW 9A.44.093(1)(b).

RCW 9A.44.093 was subsequently amended in 2005 with the passage of SSB 5309, a bill to revise the definition of "abuse or supervisory position." This bill also added the language of what is currently RCW 9A.44.093(1)(c). The Final Bill Report[1] for SSB 5309, in describing RCW 9A.44.093(1)(b), states:

> **Background:** Sexual intercourse or sexual contact with a minor who is 16- or 17-years-old is not a crime, except for two situations. Sexual misconduct with a minor is a crime if the perpetrator is a school employee and the minor is a registered student of the school. ....

The House Bill Report[2] for SSB 5309, in describing RCW 9A.44.093(1)(b), states:

> Sexual misconduct with a minor in the first degree is committed when the victim/minor is 16 or 17 years old and:
>
> the offender: (a) is at least five years older than the victim; (b) is a school employee who has, or knowingly causes another person under 18 years old to have, sexual intercourse with a registered student of the school who is aged 16 or 17; and (c) is not married to the victim/ student.

The Senate Bill Report[3] contains the same language as the Final

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[1]Appendix A *See* http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bill%20Reports/Senate%20Final/5309-S.FBR.pdf

[2]Appendix B *See* http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bill%20Reports/House/5309-S.HBR.pdf

Bill Report.

It is clear that the Legislature, in 2005, when it amended RCW 9A.44.093 to add new language considered that the statute RCW 9A.44.093(1)(b), adopted in 2001, applied to victims who are 16 or 17 years old but not to apply to victims who are eighteen and no longer minors.

IV. ARGUMENT

A. RCW 9A.44.093(1)(b) IS AMBIGUOUS.

A statute is ambiguous when it is fairly susceptible to two or more reasonable interpretations. ***Lakewood v. Pierce County***, 106 Wn. App. 63, 23 P.3d 1 (2001) *citing* ***Sacred Heart Med. Ctr. v. Dept. of Revenue***, 88 Wn. App. 632, 636, 946 P.2d 409 (1997).

RCW 9A.44.093, entitled "Sexual misconduct with a minor in the first degree," provides in pertinent part:

> (1) A person is guilty of sexual misconduct with a **minor** in the first degree when:
>
> (b) the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student.

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[3]Appendix C: *See* http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bill%20Reports/Senate/5309-S.SBR.pdf

This statute is ambiguous and susceptible to at least two reasonable interpretations. The ambiguity arises because RCW 9A.44.093(1)(b) can reasonably be interpreted in at least two ways, due to its use of the word "minor" in the title and text of the statute. First, this criminal statute can be interpreted to cap the upper age limit at below eighteen. This reasonable interpretation is based on the common and legal definitions of a "minor."

A second interpretation completely disregards the use of the word "minor" in the title and the text and thus does not impose an upper age limit for the victim. Under this interpretation, the age of the victim is not capped in imposing criminal liability. Such an interpretation criminalizes sexual intercourse between any school employee, five years older than the victim, and any consenting registered student ages nineteen, twenty or even older.

Consequently, this statute is clearly ambiguous. It is susceptible to at least two reasonable interpretations: one proposed by the Grays Harbor Prosecutor's Office and the other proposed by the Defendant.

B. THIS COURT MUST HARMONIZE THE STATUTES TO GIVE EFFECT TO APPARENTLY CONFLICTING STATUTES.

A court's ultimate goal in construing ambiguous statutes is to give effect to the Legislature's intent. ***Seven Gables v. MGM/ UA Entertainment Co***, 106 Wn.2d 1, 6, 721 P.2d 1 (1986).

A court must reconcile apparently conflicting statutes and give effect to each of them. ***Rose v. Erickson***, 106 Wn.2d 420, 424, 721 P.2d 969 (1986); ***Tommy P. v. Bd. of County Comm'rs***, 97 Wn.2d 385, 391-2, 645 P.2d 697(1982) citing ***State v. Fagalde***, 85 Wn.2d 730, 539 P.2d 86 (1975). If a court determines that two statutes irreconcilably conflict, the court must determine which statute the Legislature intended to prevail. ***Rose***, *supra.*

The Washington Supreme Court has stated:

> Harmonizing legislative acts is a traditional responsibility of this court. Even if an apparent conflict existed ... we would be obliged to reconcile that conflict and give effect to both statutory schemes, if this could be achieved without distorting the statutory language.
>
> ***Reese v. Sears, Roebuck & Co.*** 107 Wn.2d 563, 572, 731 P.2d 497 (1987). (Citations omitted).

The common as well as the legal definition of the word "minor" requires that this court to interpret the statute to give effect to the word "minor." The common definition of a minor is someone who is not yet 18 years of age. The applicable legal definition of a minor, as someone who has not yet reached the age of majority, is contained in RCW 26.28.010 since the word "minor" is not defined in Chapter 9A RCW.

Thus, the issue is whether there is any interpretation of RCW 9A.44.093(1)(b) which can be harmonized with RCW 26.28.010. RCW 26.28.010, in reference to the age of majority, states:

> Except as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years.

RCW 26.28.015 (5) is entitled: Age of majority for enumerated specific purposes, and specifically provides:

> Notwithstanding any other provision of law, and except as provided under RCW 26.50.020, all persons shall be deemed and taken to be of full age for the specific purposes hereafter enumerated at the age of eighteen years:
>
> (5) To make decisions in regard to their own body and the body of their lawful issue whether natural born to or adopted by such person to the full extent allowed to any other adult person including but not limited to consent to surgical operations.

RCW 71.06.010 also defines a "[m]inor" as any person under eighteen years of age.

1. Giving Effect to the Use of the Word "Minor" Caps the Age of the Victim at Under Eighteen and Harmonizes the Statutes.

To cap the age of the student so that the statue does not apply when the student is eighteen is the only interpretation that harmonizes the two statutes. It is this interpretation that is most consistent with the intent of the legislature, gives effect to both statutory schemes and is consistent with the principles of statutory construction.

This Amicus does not condone sexual activity between any school employee and any student. This Amicus recognizes that this conduct provides just and sufficient cause for termination of the

employment of the school employee and also that the Office of the Superintendent of Public Instruction (OSPI) will have cause to revoke the certificate of the teacher. Yet, this Amicus has serious problems with making sexual activity between two consenting adults a felony, particularly when the crime is defined as sexual conduct with a minor.

The Legislature could have removed the word "minor" from the statute. The Office of Superintendent of Public Instruction, in regulating the licenses of teachers did so. In doing so, OSPI has adopted clear and unambiguous regulations regarding this matter. The regulations promulgated by OSPI do not use the word "minor" in defining a "student." Rather, the OSPI regulations clearly encompass all students, regardless of age.

Specifically, WAC 181-87-040 defines the term "student" as follows:

> (1) Any student who is under the supervision, direction, or control of the education practitioner.
>
> (2) Any student enrolled in any school or school district served by the education practitioner.
>
> (3) Any student enrolled in any school or school district while attending a school related activity at which the education practitioner is performing professional duties.
>
> (4) Any former student who is under eighteen years of age and who has been under the supervision, direction, or control of the education practitioner. Former student, for

> the purpose of this section, includes but is not limited to drop outs, graduates, and students who transfer to other districts or schools.

By its omission of the term "minor" from this definition, this regulation does not have the same ambiguity as that which exists in RCW 9A.44.093. WAC 181-87-040 clearly and unambiguously includes current students regardless of age while excluding former students eighteen and older.

Since the Legislature used the word "minor" and since this term should be given some effect by this court, criminal liability should attach solely to school employees who engage in sexual intercourse with those under age 18.

2. This Court Should Consider the Title of the Act When Construing It.

It is well settled that where "the language of an act is ambiguous, the title may be resorted to as an aid to construction." ***Normandy Park v. King County Fire Dist. No. 2***, 43 Wn. App. 435, 439, 717 P.2d 769 (1986), review denied, 106 Wn.2d 1007 (1986) *citing* ***Bellevue v. Acrey,*** 37 Wn. App. 57, 62, 678 P.2d 1289, *rev'd on other grounds,* 103 Wn.2d 203, 691 P.2d 957 (1984).

Here, the title is repeated in the text of the statute. The word "minor" in the title is used with equal force and effect in the actual

language of the statute. This court must simply give effect to that language and interpret the word "minor" as it is commonly and legally defined: as someone under the age of eighteen.

3. The Legislature Did Not Intend To Criminalize Consensual Sexual Conduct Between a School Employee and An Eighteen Year Old Student.

The goal of statutory interpretation is to determine and implement the legislature's intent. A court may attempt to discern the legislative intent underlying an ambiguous statute from its legislative history. ***State v. Armendariz***, 60 Wn.2d 106, 110-11; 156 P.3d 201 (2007).

RCW 9A.44.093(1)(b) originated in HB 1091 in the 2001 legislative session. After passing the Legislature, HB 1091 was vetoed by Governor Locke. The veto message specifically states:

> Substitute House Bill No. 1091 would have made it a felony for any school employee to engage in sexual conduct with a student between 16 and 18 years old. Such conduct is already a felony if the perpetrator is at least five years older and abuses a supervisory position, such as that of a teacher or coach, by making threats or promises to the victim. **The bill was intended to remove the requirement that threats or promises be made.**

CP 34. (Emphasis added).

The House Bill Report for HB 1091 made a similar statement:

> The current statute requires that there be an actual threat or promise to use the person's authority to the detriment or benefit of the student in order for the crime to be prosecuted. **The bill will close that loophole and allow**

> **cases to be prosecuted where there isn't an abuse of a supervisory position because there isn't a threat or the employee is not in a supervisory relationship with the student.** This occurs, for example, when the employee is not the student's teacher, but a counselor or coach. The bill is narrowly drawn, and would not apply outside the school setting.
>
> CP 43 (Emphasis added).

There is no indication that the Legislature, in addressing HB 1091 intended to remove a cap on the age limit for the victim. There is nothing in any bill report or in the veto message. Following the Governor's veto of HB 1091, the language in what is currently RCW 9A.44.093(1)(b) was adopted in an omnibus bill, ESSB 6151. There was no independent hearing on this bill. Still referencing sexual misconduct with a minor, ESSB 6151 merely added the language to HB 1091 that requires a sixty-month difference in age between the school employee and the student.

This court should not construe RCW 9A.44.093(1)(b) to make it a felony for a school employee to have a sexual relationship with an eighteen year old without any evidence that the Legislature intended this effect. There is nothing in the legislative history that indicates that the Legislature intended such an application. Rather, it seems clear that the legislative intent was to remove the element of a supervisory relationship from the definition of the crime so that the elements of the crime listed in RCW 9A.44.093(1)(a) could be proved even if the school employee had

no supervisory relationship with the student. CP 45. Since the statute continues to reference sexual misconduct with a minor, there is no basis to construe the statute to apply to sexual misconduct with persons who are no longer minors.

C. THE RULE OF LENITY REQUIRES THAT RCW 9A.44.093(1)(b) BE CONSTRUED IN FAVOR OF THE ACCUSED.

The rule of lenity applies to criminal statutes. It provides that where an ambiguous statute has two possible interpretations, the statute is to be strictly construed in favor of the accused. ***State v. Lively***, 130 Wn.2d 1, 921 P.2d 1035 (1996); ***Matter of Sietz***, 124 Wn.2d 645, 880 P.2d 34 (1994). Criminal statutes must be strictly construed so that only the specific conduct which is clearly and manifestly within statutory terms is subject to punitive sanctions. ***State v. Carter***, 89 Wn.2d 236, 570 P.2d 1218 (1977).

For reasons clearly stated above, the statute is ambiguous as to whether or not sexual conduct with someone who is not a minor is within its reach. Take, for example, the case of a twenty-four year old who is employed by a school as a food service worker. Assume that this twenty-four year old has a sexual relationship with a nineteen year old student. Under one interpretation, the employee would be criminally liable for Sexual Conduct with a Minor in the First Degree. Yet, under the

interpretation which gives effect to the word "minor" within the statute, the employee would not be subject to criminal sanctions but may be subject to action by the school district for an employment action. Under the rule of lenity, interpreting the statute in favor of the accused, the second interpretation would be the appropriate one and the employee should not be found to have engaged in Sexual Conduct with a Minor in the First Degree.

D. THE STATUTE IS UNCONSTITUTIONALLY VAGUE.

In a void-for-vagueness challenge, the moving party must show that either (1) the statute or regulation does not define the offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. ***State v. Williams***, 144 Wn.2d 197; 26 P.3d 890 (2001); ***State v. Coria***, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). A law is indefinite when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application, as such a law would violate the essential element of due process of law: fair warning. ***State v. Boyd***, 137 Wn. App. 910, 155 P.3d 188, (2007); ***City of Bremerton v. Spears***, 134 Wn.2d 141, 161, 949 P.2d 347 (1998); *citing* ***Burien Bark Supply v. King County***, 106 Wn.2d 868, 871, 725 P.2d 994 (1986). "In analyzing a statute for

vagueness, a court examines the context of the enactment as a whole, giving the language a sensible, meaningful, and practical interpretation to determine whether it gives fair warning of the proscribed conduct." ***Boyd***, *supra* at 917.

Here, a person is left to guess at what the term "minor" means by its inclusion in the statute. The average citizen has no way of knowing whether sexual conduct with a student who is eighteen year old or older is prohibited by the statute. Again, consider the situation of the twenty-three year old who is employed as a custodian or cook in the public schools. Was it the legislature's intent to criminalize sexual conduct between this person and an eighteen year old student? And what else could the word "minor" mean if it did not cap the age limit of the student at eighteen?

Each person's perception of who is included will differ based on each person's individual interpretation. A statute is unconstitutionally vague if it "invites an inordinate amount of police discretion" by containing terms that are inherently subjective. ***Boyd***, *supra*; ***State v. Stevenson***, 128 Wn. App. 179, 188, 114 P.2d 699 (2005) (quoting ***City of Spokane v. Douglass***, 115 Wn.2d 171, 181, 795 P.2d 693 (1990). While the term "minor" is not inherently subjective, it becomes subjective when it is not given its common and ordinary meaning.

Evidence of this difference in interpretation is in the record in this matter. The Office of Superintendent of Public Instruction and the Washington School Personnel Association provided a training in 2007 "to assist all employers and employees in being accountable..." CP 57; See generally CP 55-62. The training materials specifically state: "[t]his training module is an essential resource for understanding our obligations. It provides an overview of what it expected, thus ensuring an environment where all students can learn, thrive, and prosper." CP 58. In addressing Sexual Misconduct with a minor, the training materials clearly state:

> Washington state law makes sexual misconduct between school district employees and students unlawful. If the student is over 16 and under 18, it is a felony when the employee is at least five years older. In all other cases involving students and employees it is an unprofessional act and will result in discipline (most typically discharge) and potential sanctions against and loss of a teaching credential. CP 61.

From this record, it is evident that the trainers at OSPI interpreted RCW 9A.44.093(1)(b) as applying only when the victim is less than eighteen. It is this message that was given to employees to inform them as to what was expected of them in a criminal context.

The very reason that the vagueness doctrine exists is to avoid the quandary of making a person guess as to the meaning of the statute.

RCW 9A.44.093(1)(b) is unconstitutionally vague to the extent it references a "minor" but then does not define the term such that an ordinary person can understand it. This court should construe the statute so that it does not apply to school employees who have sexual conduct with a student who is eighteen or older.

V. CONCLUSION

RCW 9A.44.030(1)(b) is ambiguous. Rules of statutory construction regarding ambiguous statutes must be applied. Any statutory construction which subjects a school employee to criminal liability for engaging in sexual activity with someone who is over the age of majority is fraught with legal problems. Such a construction violates the rules of lenity and substantive due process and is inconsistent with the principles of statutory construction.

This Amicus respectfully requests this Court to determine that RCW 9A.44.030(1)(b) apply only to sexual contact between a school employee and a minor student, who is under the age of eighteen. Thus, this Court should dismiss the criminal case against this defendant.

Respectfully submitted this 8th day of July, 2008.

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APPENDIX A

FINAL BILL REPORT
SSB 5309

C 262 L 05
Synopsis as Enacted

Brief Description: Defining sexual misconduct with a minor.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senators Kohl-Welles, Benton and Kline).

Senate Committee on Human Services & Corrections
House Committee on Criminal Justice & Corrections

Background: Sexual intercourse or sexual contact with a minor who is 16- or 17-years-old is not a crime, except for two situations. Sexual misconduct with a minor is a crime if the perpetrator is a school employee and the minor is a registered student of the school. Sexual misconduct with a 16- or 17-year-old is also a crime if the perpetrator is at least five years older, is not married to but is in a significant relationship to the minor, and abuses a supervisory position within that relationship to engage in or cause the minor to have sexual intercourse (first degree) or sexual contact (second degree). Sexual misconduct with a minor in the first degree is a class C felony, and sexual misconduct in the second degree is a gross misdemeanor.

In the context of the crime of sexual misconduct with a minor, "abuse of a supervisory position" means a direct or indirect threat or promise to use authority to the detriment or benefit of a minor. "Significant relationship" means a situation in which the perpetrator voluntarily or professionally provides education, health, welfare, or organized recreation, principally for minors. It also means a situation in which a person supervises minors in the course of his or her work. It also means a situation in which a person provides welfare, health, or residential assistance, personal care, or organized recreational activities to frail elders or vulnerable adults.

Summary: The definition of "abuse of a supervisory position," an element of the crime of sexual misconduct with a minor, is amended to include exploiting a significant relationship to obtain the consent of a minor. The section of the criminal law establishing the elements of the crime of sexual misconduct with a minor is also amended to include a situation in which a foster parent has sexual contact or sexual intercourse, or causes another person under the age of eighteen to have sexual contact or sexual intercourse, with his or her foster child who is at least 16 years old.

Votes on Final Passage:

Senate	44	0
House	94	0

Effective: July 24, 2005

APPENDIX B

HOUSE BILL REPORT
SSB 5309

As Passed House:
April 14, 2005

Title: An act relating to sexual misconduct with a minor.

Brief Description: Defining sexual misconduct with a minor.

Sponsors: By Senate Committee on Human Services & Corrections (originally sponsored by Senators Kohl-Welles, Benton and Kline).

Brief History:
Committee Activity:
Criminal Justice & Corrections: 3/25/05, 3/31/05 [DP].
Floor Activity:
Passed House: 4/14/05, 94-0.

Brief Summary of Substitute Bill

- Extends the definition of "abuse of a supervisory position," as it relates to sexual misconduct with a minor in the first and second degrees, to include exploitation of a significant relationship in order to obtain the consent of a minor.
- Adds an alternate means of committing sexual misconduct with a minor in the first and second degrees.

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority Report: Do pass. Signed by 7 members: Representatives O'Brien, Chair; Darneille, Vice Chair; Pearson, Ranking Minority Member; Ahern, Assistant Ranking Minority Member; Kagi, Kirby and Strow.

Staff: Kathryn Leathers (786-7114).

Background:

The age of consent in Washington is 16. As a result, absent forcible compulsion, a clear lack of consent, or in cases of incest, having sexual intercourse or sexual contact with a minor who is 16 or 17 is not a crime, except in very limited situations. Two such situations include the crimes of sexual misconduct in the first and second degree. Sexual misconduct with a minor in the first degree is committed when the victim/minor is 16 or 17 years old and:

(1) the offender: (a) is at least five years older than the victim; (b) is not married to the victim; (c) has, or knowingly causes another person under 18 years old to have, sexual intercourse with the victim; (d) is in a significant relationship with the victim; and (e) abuses a supervisory position within that significant relationship in order to engage in (or knowingly cause another person under the age of 18 to have) sexual intercourse with the victim; or (2) the offender: (a) is at least five years older than the victim; (b) is a school employee who has, or knowingly causes another person under 18 years old to have, sexual intercourse with a registered student of the school who is aged 16 or 17; and (c) is not married to the victim/ student.

Sexual misconduct with a minor in the second degree is committed under the same circumstances as first degree but involves sexual contact rather than sexual intercourse.

"Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party. "Sexual intercourse" has its ordinary meaning as well as (a) any penetration of the vagina or anus by an object when committed on one person by another, except when such penetration is for medically recognized treatment or diagnostic purposes; and (b) any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.

"Abuse of a supervisory position" means a direct or indirect threat or promise to use authority to the detriment or benefit of a minor. "Significant relationship" means a situation in which the offender, whether voluntarily or professionally, provides education, health, welfare, or organized recreation, principally for minors. It also means situations in which a person supervises minors in the course of his or her work, as well as situations in which a person provides welfare, health, or residential assistance, personal care, or organized recreational activities to frail elders or vulnerable adults.

Sexual misconduct with a minor in the first degree is a class C felony. Sexual misconduct with a minor in the second degree is a gross misdemeanor.

Summary of Bill:

This bill expands the definition of "abuse of a supervisory position," an element of the crimes of sexual misconduct with a minor in the first and second degree, to include exploitation of a significant relationship for the purpose of obtaining the consent of a minor.

The bill also creates a third method of committing the crimes of sexual misconduct with a minor in the first and second degree. Under this new alternative, a person is guilty of sexual misconduct with a minor in the first degree if the offender is a foster parent who has, or knowingly causes another person under the age of 18 to have, sexual intercourse with the offender's foster child and the foster child is at least 16 years old. And, a person is guilty of sexual misconduct with a minor in the second degree if the offender has or causes another person under the age of 18 to have, sexual contact with the offender's foster child and the foster child is at least 16 years old.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: This bill helps protect children ages 16 and 17 who are victimized by sexual misconduct, particularly as it relates to athletes and their private coaches. Close relationships often develop in these coach-athlete relationships. Sometimes this can lead to abuse. The effect of these relationships can be traumatic and devastating for both the children and their families.

Testimony Against: None.

Persons Testifying: Senator Kohl-Wells, prime sponsor; and Jack Price.

Persons Signed In To Testify But Not Testifying: None.

APPENDIX C

SENATE BILL REPORT
SSB 5309

As Passed Senate, March 9, 2005

Title: An act relating to sexual misconduct with a minor.

Brief Description: Defining sexual misconduct with a minor.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senators Kohl-Welles, Benton and Kline).

Brief History:
Committee Activity: Human Services & Corrections: 2/1/05, 2/14/05 [DPS].
Passed Senate: 3/9/05, 44-0.

SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

Majority Report: That Substitute Senate Bill No. 5309 be substituted therefor, and the substitute bill do pass.

Signed by Senators Hargrove, Chair; Regala, Vice Chair; Stevens, Ranking Minority Member; Brandland, Carrell and McAuliffe.

Staff: Kiki Keizer (786-7430)

Background: Sexual intercourse or sexual contact with a minor who is 16 or 17 is not a crime, except for two situations. Sexual misconduct with a minor is a crime if the perpetrator is a school employee and the minor is a registered student of the school. Sexual misconduct with a 16- or 17-year-old is also a crime if the perpetrator is at least five years older, is not married to but is in a significant relationship to the minor, and abuses a supervisory position within that relationship to engage in or cause the minor to have sexual intercourse (first degree) or sexual contact (second degree). Sexual misconduct with a minor in the first degree is a class C felony and sexual misconduct in the second degree is a gross misdemeanor.

In the context of the crime of sexual misconduct with a minor, "abuse of a supervisory position" means a direct or indirect threat or promise to use authority to the detriment or benefit of a minor. "Significant relationship" means a situation in which the perpetrator voluntarily or professionally provides education, health, welfare, or organized recreation, principally for minors. It also means a situation in which a person supervises minors in the course of his or her work. It also means a situation in which a person provides welfare, health, or residential assistance, personal care, or organized recreational activities to frail elders or vulnerable adults.

Summary of Bill: The definition of "abuse of a supervisory position," an element of the crime of sexual misconduct with a minor, is amended to include exploiting a significant relationship to obtain the consent of a minor. The section of the criminal law establishing the elements of the crime of sexual misconduct with a minor is also amended to include a situation in which a foster parent has sexual contact or sexual intercourse, or causes another person

under the age of eighteen to have sexual contact or sexual intercourse, with his or her foster child who is at least 16 years old.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For The Original Bill: The way that the crime of sexual misconduct with a minor is currently defined does not pick up on situations in which adults prey upon teenagers who are physically mature but who are not developmentally prepared to make sound judgments in adult situations. Unless the perpetrator is a school employee and the victim is a student, the law currently requires the victim to show that his or her compliance with the perpetrator's demand for sex was based on a threat or promise of a special benefit. It is hard to prove that compliance was predicated on a threat or a promise. It is also more likely that a perpetrator will gradually gain the trust of a vulnerable youth and then take advantage of that trusting relationship by seducing the youth. The law should protect children under 18 from coaches, mentors, foster parents, and others who manipulate them into consenting to sexual contact or intercourse.

Testimony Against The Original Bill: None.

Who Testified: PRO: Sen. Jeanne Kohl-Welles, prime sponsor; Jack Rice, citizen; Donna Rice, citizen; Toby Cremer, Washington Coalition of Sexual Assault Programs; Tom McBride, Washington Association of Prosecuting Attorneys.

CERTIFICATE OF SERVICE

I certify that I sent out a copy of the foregoing WASHINGTON EDUCATION ASSOCIATION'S AMICUS CURIAE BRIEF postage prepaid, via U.S. Mail on the 8th day of July, 2008 to the following counsel of record at the following addresses:

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